

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange File Nos. 4/5-DSS-EXT-90
Satellite, Inc.

For Extension of Time to Construct
and Launch Space Stations in the
Domestic Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 1992; Released: March 20, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. National Exchange Satellite, Inc. (NEXSAT) requests extensions of time in which to construct and launch its SpotNet satellites.¹ General Instrument Corporation (GIC) opposed a number of these requests² and NEXSAT replied.³ For the reasons set forth below, NEXSAT's requests are denied.

II. BACKGROUND

2. In November 1988, NEXSAT was authorized to construct and launch its SpotNet-1 and SpotNet-2 satellites, and to construct a ground-spare, SpotNet-3.⁴ NEXSAT subsequently filed requests for orbital reassignment of its SpotNet-1 and -2 satellites, which were granted in January 1990.⁵ The *Authorization Order* required NEXSAT to implement its satellites in accordance with the following milestone schedule:

Satellite	Commence Construction	Complete Construction	Launch
SpotNet-1	August 1989	January 1993	March 1993
SpotNet-2	July 1990	July 1993	September 1993
SpotNet-3	January 1991	January 1994	ground spare

The *Authorization Order* further stipulated that if these deadlines were not met or extended by the Commission for good cause shown, the authorizations would become, by their own terms, null and void.⁶

3. In February 1990, NEXSAT requested,⁷ and was subsequently granted,⁸ extensions of its milestone commitments. In this First Request, NEXSAT asserted that it was impossible to make commitments regarding construction of its satellites until the Commission had acted on its request for orbital reassignment. The Bureau specifically rejected these arguments but granted the First Request because of NEXSAT's possible confusion about implementation of its milestone schedule while its reassignment request was pending. At that time, the Bureau further ordered NEXSAT to submit "copies of its construction contracts with the spacecraft manufacturer, including any relevant amendments and notices to proceed no later than October 31, 1990 for SpotNet-1 and no later than March 31, 1991 for SpotNet-2."⁹ The Bureau stated that "failure to respond within this time frame will subject the authorizations for these satellites to revocation."¹⁰

4. On the eve of the expiration of its revised construction commencement date for SpotNet-1, NEXSAT filed another request for an "extension of time in which to file construction contracts" for its SpotNet satellites.¹¹ In this Second Request, NEXSAT states that because of the unique nature of the SpotNet payload, its negotiations with potential manufacturers have been far more detailed and complex than is common when contracting for more conventional spacecraft. Further, NEXSAT asserts that the public interest will be served by granting its request because NEXSAT, as a new entrant to the satellite communications field, will encourage advances in state-of-the-art satellite communications and will add diversity to what NEXSAT characterizes as a shrinking field of existing satellite service providers. Accordingly, it requests that the commencement of construction deadlines for SpotNets-1, -2 and -3 be extended until April 1991, March 1992 and September 1992, respectively.

¹ NEXSAT has requested four extensions of its milestone commitments. See paras. 2-6, *infra*.

² GIC has filed several Oppositions to NEXSAT's Requests (Opposition to Request for Extension of Time (December 14, 1990), Opposition to Request for Extension of Time (March 18, 1991) and Motion for Leave to Supplement Opposition (April 15, 1991)) in which GIC urges us to deny NEXSAT's extension requests or, alternatively, to grant NEXSAT's requests with the condition that its authorizations be subject to the outcome of the Commission's disposition of GIC's petition seeking a change in the Commission's orbital spacing policy from 2⁰ to 3⁰. The disposition of NEXSAT's requests are made in accordance with established domestic fixed-satellite policies. The spacing issues raised by GIC have already been considered by the Commission in another proceeding (RM-7627, RM-7628) and will not be addressed herein. See FCC 92-1, released January 15, 1992.

³ Reply to Opposition (April 5, 1990).

⁴ National Exchange Satellite, Inc., 3 FCC Rcd 6992 (1988)

(*Authorization Order*).

⁵ Assignment of Orbital Locations to Space Stations in the Domestic Fixed Satellite Service, 5 FCC Rcd 179 (1990). SpotNets-1 and -2 were respectively assigned to the 93⁰ W.L. and 127⁰ W.L. orbital locations.

⁶ *Authorization Order* at para. 8.

⁷ Letter from Counsel, NEXSAT to Chief, Domestic Facilities Division, February 22, 1990 (the First Request). Although NEXSAT was originally required to commence construction of SpotNet-1 in August of 1989, its First Request for an extension of this deadline was not filed until February 1990.

⁸ Letter from Chief, Domestic Facilities Division to Counsel, NEXSAT, June 7, 1990 (the June 7th Letter).

⁹ *Id.* at 4. The commencement deadline for SpotNet-3 was unchanged.

¹⁰ June 7th Letter, note 8, *supra*.

¹¹ Request for Extension of Time, October 31, 1990 (the Second Request).

5. While Commission action was pending on this Second Request, NEXSAT filed a "redacted" copy of a contract with TRW, Inc. Space Technology Group (TRW) dated February 21, 1991. This contract authorized TRW to complete, by August 1991,¹² an in-depth design study of NEXSAT's latest technical proposal to launch four single-band satellites instead of the two hybrids originally planned. "Assuming the success of that study," NEXSAT was allowed 21 days thereafter to accept or reject TRW's proposal.¹³ In conjunction with the filing of this contract, NEXSAT requested a third extension of its milestone schedule (the Third Request). While the exact dates upon which NEXSAT therein proposes to meet its milestones are not clear, it appears that construction of SpotNet-1 would commence on March 1, 1992.¹⁴ NEXSAT seeks this third extension to "facilitate the continued development" of its SpotNet system.

6. NEXSAT's latest extension request (the Fourth Request) was filed on January 6, 1992. The company has recently been engaged in discussions with the EDSAT Institute (EDSAT), which has studied the needs of the national educational community for transponder capacity. EDSAT concludes that there should be at least one dedicated national satellite network to meet educational needs. Toward that end, NEXSAT and EDSAT have initiated a joint feasibility study of the technical and economic merits of the potential use of the SpotNet system to meet EDSAT's requirements. Accordingly, NEXSAT now requests "an additional 12 to 18 months" within which to complete this joint feasibility study and to either "(1) begin construction of the first of the SpotNet satellites, or (2) if need be, submit an application to the Commission seeking to modify the SpotNet construction permit in order to conform system design to EDSAT requirements and/or TRW's recommendations."¹⁵

7. Nexsat has not withdrawn any of its extension requests and it is still possible for the company to meet certain deadlines proposed in each. We will therefore consider herein the Second, Third and Fourth Requests.

III. DISCUSSION

8. The milestone schedule which is included in every space station authorization issued by the Commission is designed to assure that licensees are moving forward with the construction and launch of their systems in a timely manner. Requiring licensees to make and fulfill realistic construction and launch commitments prevents increasingly scarce orbital locations from being "warehoused" by licensees. Such warehousing could hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately with the construction and launch of their satellite systems.¹⁶ Efficient management of the orbit spectrum resource also requires that licensees implement their plans in an orderly manner.¹⁷ Accordingly, extensions of the milestone schedule are granted only when delay in implementation is due to circumstances beyond the control of the licensee.¹⁸

A. Second Request

9. In support of its Second Request, NEXSAT initially notes that it will require additional construction time "within which to resolve the difficult technological issues" inherent in what it describes as its state-of-the-art satellite proposal. While NEXSAT would like more time to examine and ultimately to determine the best technology to pursue, such business concerns are not beyond an applicant's control and thus are not valid bases for an extension of time to commence construction of a satellite.¹⁹

10. NEXSAT further alleges that the public interest requires a grant of its extension request in order to assure that a "meaningful" amount of competition exists in the satellite communications marketplace.²⁰ It presents no evidence, however, that strict enforcement of milestone schedules impairs the opportunity for new entrants, such as NEXSAT, to compete, or in support of its veiled contention that active competition does not presently exist in the domestic fixed-satellite service. Indeed, the Commission's "open skies" policies are designed to encourage participation by all qualified entities in the provision of competitive satellite communications services.²¹ However,

¹² On September 17, 1991, NEXSAT notified the Commission that the deadline for completion of this design study had been extended by the parties until October 31, 1991. That study has been completed. See Letter from Counsel, NEXSAT to Secretary, Federal Communications Commission, January 6, 1992.

¹³ Article 17, TRW Contract. NEXSAT does not argue that this contingent contract is sufficiently binding to satisfy its commencement of construction commitments. See, e.g., Letter from Chief, Domestic Facilities Division to Hughes Communications Galaxy, Inc. (June 7, 1990) (non-contingent construction contract fulfills construction commencement condition in satellite license).

¹⁴ See Exhibit C of the TRW Contract.

¹⁵ Request for Extension of Time, January 6, 1992 (the Fourth Request) at 2.

¹⁶ MCI Communications Corporation, 2 FCC Rcd 233.

¹⁷ Given the rapidly changing technology in the satellite industry and the uncertainty of traffic growth projections over time, the Commission does not even consider applications for either replacement or expansion satellites that are not intended to be launched promptly. See, e.g., Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 5 FCC Rcd 179 (1990), at n.44; Licensing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985), at

n.43 and para. 28.

¹⁸ MCI Communications Corporation, *supra*; see also Hughes Communications Galaxy, Inc. 5 FCC Rcd 3423, 3424 (extensions of milestone schedules generally granted only when delay in implementation due to circumstances beyond the control of the licensee).

¹⁹ See, e.g., American Telephone and Telegraph Company, *supra*, at 5591 (economic considerations and business judgments are not circumstances beyond a licensee's control); MCI Communications Corporation, *supra*, at 234. See also *P&R Temmer*, 743 F.2d 918 (1984) (licensee proposing innovative technology bears risk that it will be unable to meet authorization conditions if technology fails to perform as hoped).

²⁰ In its Second Request, NEXSAT states that "[a]fter a series of mergers and acquisitions", AT&T, Hughes, GE Americom and GTE control most of the C-band and Ku-band orbital positions.

²¹ We have, for example, limited to two the number of initial orbital assignments available to each licensee. Additional locations are assigned to existing licensees only upon a showing that in-orbit satellites are essentially filled and that an additional orbit location is needed to satisfy firm customer growth requirements. See *Domestic Fixed-Satellite Service - Orbit Deployment Plan*, 84 FCC 2d 584, 603 (1981).

given the limited availability of domestic fixed-satellite C- and Ku-band orbital locations, mechanisms have been adopted to assure that orbital locations are not held by entities who are not able to proceed promptly with the implementation of innovative satellite systems. These mechanisms, however, do not inhibit new entry. They merely insure the timely availability of proposed services. NEXSAT itself is a prime example of the continued ability of new entrants to seek and receive domestic fixed-satellite licenses. While market forces may have promoted acquisitions and mergers resulting in the consolidation of some space station licensees, such consolidation has not been shown to be the result of restrictive Commission licensing policies, nor to be contrary to the public interest.

11. Both new entry and the innovative service that it may promote are of little public value if the proposed satellite services are not predictably and promptly made available. The strict enforcement of milestone schedules, which will insure this availability, imposes no greater burden on new entrants than it does on existing service providers; an applicant's plans, and its ability to implement those plans, are expected to be carefully considered prior to the application process. In sum, we have no reason to believe that active competition does not currently exist in, nor do we believe that our decision today will have a chilling effect on continued open entry into, the domestic fixed-satellite service. On the other hand, public policy concerns regarding spectrum warehousing and the prompt availability of proposed satellite services support the continued enforcement of our milestone deadlines. We accordingly cannot find that the grant of NEXSAT's Second Request for an extension of its milestone commitments is in the public interest.

B. Third Request

12. In support of its Third Request for extension, NEXSAT submits that it needs additional time to make a "choice of conventional technology versus new, but potentially quite beneficial, technology."²² As discussed above,²³ this decision is wholly within NEXSAT's control and does not therefore justify an extension of the company's milestone commitments.

13. NEXSAT argues further that the facts in Hughes Communications Galaxy, Inc. (*Hughes*), *supra*, are analogous to its own and thus support its request for extension. Contrary to NEXSAT's analysis, however, neither the facts nor the underlying rationale of *Hughes* support a grant of its request. In *Hughes*, the licensee had originally been authorized to construct and launch two single-band satellites. The implementation dates for these satellites were not identical. Accordingly, when the licensee later proposed to construct a hybrid satellite, it requested that the implementation schedules be synchronized to allow the hybrid to be constructed and launched in accordance with the original milestones for the Ku-band satellite, not the C-band satellite. Since the C-band satellite was to have been completed earlier than the Ku-band satellite, this amounted to a request for an extension of time in which to construct and launch the C-band payload. Noting the

Commission's desire to encourage the use of economically efficient hybrids whenever possible, the Bureau specifically rejected allegations that the licensee in *Hughes* was attempting to warehouse its C-band location. Because the implementation dates for the single-band satellites did not coincide, an extension for one "half" of the hybrid was necessary. The licensee in *Hughes* was also required to commence construction of its satellite immediately upon grant of its extension request, so there could be no undue delay in implementation.²⁴

14. Here, NEXSAT is contemplating the construction of four satellites in place of its two originally-proposed hybrids. Unlike the situation in *Hughes*, this change is not technologically dependent on a revision of the milestone schedules. NEXSAT further does not propose to begin construction immediately. Rather, under the terms of its arrangement with TRW, NEXSAT has not committed itself to proceed with construction at any specified time or with any particular technology, and is free to decide to proceed in a different fashion, or, indeed, not to proceed with implementation at all.

15. NEXSAT nonetheless contends that public policy concerns support a grant of its Third Request. It states that the NEXSAT/TRW developmental efforts should lead to the introduction of technologies that could significantly change satellite communications to the benefit of the public, which would enjoy higher quality, less expensive services.

16. As NEXSAT correctly points out, "[r]apid technological advances...have marked the period since 1974, when the first commercial domsat was orbited."²⁵ Clearly, technological advancement is a desirable goal,²⁶ and one that has been encouraged through the Commission's "open skies" policies. It is equally clear, however, that the Commission's adoption and enforcement of its milestone deadlines has not precluded technological improvements. As discussed at paragraph 10, *supra*, our procedural mechanisms are designed to assure that orbital locations are held only by entities who are willing and able to implement their often innovative proposals.

17. NEXSAT finally argues that grant of its Third Request will not lead to the exclusion of others who would use these locations. However, the locations assigned to both SpotNet-1 and SpotNet-2 allow for 50-state coverage. Should these locations become available, it is unlikely that they will remain unutilized by either new applicants or current licensees seeking orbital reassignment. If they do remain vacant, of course, NEXSAT may reapply for these locations, or it may resubmit its application for other available locations when it is ready and able to implement its system.

C. Fourth Request

18. In support of its Fourth Request, NEXSAT alleges that the extension sought will allow it to explore the merits of attempting to develop a satellite system in conjunction with EDSAT. EDSAT's goal of developing a comprehensive, predictable and affordable satellite communications system to meet the needs of the national

²² Reply to Opposition, *supra*.

²³ See para. 9, *supra*.

²⁴ *Hughes* actually had begun construction of its satellite pursuant to a Section 319(d) waiver.

²⁵ *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1468 (1984).

²⁶ See 47 U.S.C. § 303(g).

educational community appears to be highly laudable. We encourage EDSAT's continued efforts to assess its needs and to secure a system that is best suited to meet those needs. To the extent that NEXSAT, or any other space segment provider, is ultimately chosen by EDSAT to provide the desired service, we will make every effort to accommodate the parties' needs at the time a tangible proposal is before us.²⁷ However, under our long-standing policies, we cannot allow NEXSAT to continue to delay implementation of its satellite system based upon speculation that it may be selected to implement the EDSAT network. NEXSAT originally committed to commence construction of its first satellite nearly two and one-half years ago. Now it seeks an 18-month further delay in the commencement of construction, while giving no assurance that it will ever construct its authorized system. As discussed at paragraphs 8 and 9, *supra*, such commercial and technical considerations are wholly within the control of the applicant and thus do not support a further extension of NEXSAT's milestone commitments.

IV. CONCLUSION

19. NEXSAT has not shown that either precedent or policy supports a grant of its extension requests. On the other hand, there are compelling reasons to deny these requests. If the broadly stated desires to provide state-of-the-art technological services, or to examine potential commercial applications of a system, were sufficient to support an extension of milestone schedules, any applicant could successfully argue that its deadlines should be delayed. Thus, there would no longer be any meaningful assurances that satellite systems would ever be implemented. This is precisely the type of situation that we intend to proscribe. Accordingly, we cannot find that the public convenience and necessity will be furthered by the grant of NEXSAT's Requests.

V. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that the requests of National Exchange Satellite, Inc. for an extension of time in which to construct and launch space stations in the domestic fixed-satellite service ARE DENIED.

21. IT IS FURTHER ORDERED, pursuant to Section 0.291 of the Commission's rules on delegations of authority, that the authorizations granted to National Exchange Satellite, Inc. in National Exchange Satellite, Inc., 3 FCC Rcd 6992 for the SpotNet-1, SpotNet-2 and SpotNet-3 satellites ARE DECLARED NULL AND VOID.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

²⁷ As discussed at para. 17, *supra*, NEXSAT is free to reapply for these same, or other available, orbital locations at such time

as it is ready and able to implement its system.